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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE COLLEGE ATHLETE NIL
 LITIGATION

Case No. 4:20-cv-03919-CW

**PLAINTIFFS' MOTION FOR A
 PROSPECTIVE ORDER CONCERNING
 MISLEADING THIRD-PARTY CLAIMS
 FILING SERVICES**

Hrg. Date: December 26, 2024
 Time: 2:30 p.m.
 Judge: Hon. Claudia Wilken
 Courtroom: 2, 4th Floor

I. INTRODUCTION

Plaintiffs, by and through their undersigned counsel, respectfully seek judicial intervention to protect Class Members from misleading communications regarding the Settlement currently pending before the Court. Since preliminary approval of the Settlement, Class Counsel has learned that a number of third parties have sought to profit from the Settlement by offering claims-filing services to Class Members. While some of these companies may be engaged in proper business activities, Class Counsel have discovered that some entities have made various misleading statements to solicit Class Members.

For example, Class Counsel recently learned that one company, Profound Sports, was using its website and internet publications to target Class Members and improperly stated, among other things, that (1) they “require a professional legal and claims team” to participate in the Settlement; and (2) their damages settlement allocation is an “offer” that they may negotiate. It also incorrectly stated that “[a]ll settlement cases where you were not specifically represented lead to lower payouts.”

Class Counsel sent the company a cease-and-desist letter explaining that these communications are inappropriate, false, and misleading, and the company agreed to make changes to the misleading statements on its website and, subject to the Court’s approval, send a corrective notice drafted by Class Counsel to all Class Members with which it has communicated.

In addition to Profound Sports, Class Counsel and Verita, the Claims Administrator, have been contacted or become aware of several other third parties who are offering claims-filing services to Class Members.

Plaintiffs herein respectfully submit a proposed solution to prevent Class Members from being misled and ensure that they receive truthful and accurate information about the terms of the Settlement. The proposal seeks to minimize possibilities for Class Member confusion while at the same time permitting third-party claims filers to offer their services. Accordingly, pursuant to the Court’s inherent power to regulate class communications under Federal Rule of Civil Procedure 23(d), Plaintiffs request an Order that:

1 1. All third-party claims filing companies seeking to represent Class Members in
2 connection with the Settlement be required to include the following in any solicitation or
3 engagement agreement with prospective clients:

4 a. A statement making clear that:

5 1. Class Members need not use any third-party service in order to
6 participate in any monetary relief;

7 2. the use of a third-party service will not increase any monetary relief that
8 Class Members are eligible to receive under the Settlement;

9 3. no-cost assistance is available from the Claims Administrator and Class
10 Counsel during the claims-filing period and their contact information is
11 available on the Court-approved Settlement website, and

12 b. Information (including the full URL or direct link) directing Class Members to
13 the Court-approved Settlement website for additional information.

14 2. The proposed relief outlined above must be included in any solicitation or marketing
15 materials, in any form, including on company websites, in mail and email solicitations, and in
16 telephone and in-person solicitations, as well as in engagement agreements with Class Members.

17 3. Solicitations that do not contain the required information (as set forth above) may
18 be deemed misleading and following notice and an opportunity to cure, those entities may be
19 enjoined permanently from taking any role in the settlement.

20 4. Profound Sports shall be required to send, at their own expense, a corrective notice
21 (attached hereto as Exhibit A) to athletes that have been contacted by or engaged with Profound
22 Sports for claims-filing services related to the Settlement to ensure that they understand the contract
23 of representation and were not misled by prior solicitations. Upon receipt of the corrective notice,
24 Class Members would have the option to void their contract.

25 5. Class Counsel and the Claims Administrator will continue to monitor third-party
26 claims filing companies to ensure that they comply with any Order of the Court and will provide
27 any third-party filing companies that contact Class Counsel or the Claims Administrator with this
28 Order.

II. BACKGROUND

On October 7, 2024, the Court granted preliminary approval of the Settlement and directed notice to the Class. Dkt. 544. On October 23, 2024, Class Counsel learned that Profound Sports, a company providing college athletes with services relating to their NILs, was using its website to solicit potential Class Members to sign up for “NIL Claims Representation” and “legal services” related to the Settlement. The company’s advertisements falsely stated that (1) Class Members “will require a professional legal and claims team” to participate in, object to, or opt out of the Settlement; (2) without separate representation, Class Members will not receive fair or adequate damages because “[a]ll settlement cases where you are not specifically represented lead to lower payouts”; and (3) Class Members’ Settlement payments and schedules could be “negotiated and agreed upon,” and that there would be a “contract” that the company would “redline.” On October 24, 2024, Class Counsel sent the company a letter explaining that (1) separate representation is not required under the Settlement, (2) Class Members will not receive lower payouts without separate representation, and (3) damages payments and schedules are not negotiable under the Settlement, and warning that their statements interfered with Class Members’ due process rights to complete, accurate, and objective information in making the choice of whether to participate in the Settlement. Class Counsel requested prompt remedial measures and written confirmation that those measures had been carried out. In response, Profound Sports made the requested changes to its website. Subject to the Court’s approval, Profound Sports also agreed to send the corrective notice, attached as Exhibit A, which was provided by Class Counsel.

Class Counsel have also been contacted by and otherwise identified other third-party filing companies who are offering services related to this action.¹ Class Counsel intends to monitor the business environment to keep abreast of any new entrants into the claims-filing market. Class Counsel also requests that a summary of any relief that is granted be conspicuously posted on the Court-approved settlement website.

¹ The following three companies have been identified to date: Raistone Capital, Fifth Quarter Sports, and Robbins Geller Rudman & Dowd, LLP.

III. ARGUMENT

In any class action, each individual class member has a due process right to decide for himself or herself whether to participate in, object to, or opt out of a Settlement, and to make that decision based on objective, neutral information. *Fox v. Saginaw Cty.*, 35 F.4th 1042, 1046 (6th Cir. 2022). It is “the responsibility of the court” to direct notice to class members “and to safeguard them from unauthorized, misleading communications” and to restrict “abusive communications” directed at class members “includ[ing] anything related to the litigation that ‘pose[s] a serious threat to the fairness of the litigation process, the adequacy of representation, and the administration of justice generally.’” *Erhardt v. Prudential Grp., Inc.*, 629 F.2d 843, 846 (2d Cir. 1980); *Fox*, 35 F.4th at 1047 (citation omitted). “[A]busive communications” include “misleading information, misrepresenting the nature of the class action, or coercing prospective class members to opt out of the class.” *Fox*, 35 F.4th at 1047. (citations and quotations omitted). “Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice.” *Erhardt*, 629 F.2d at 846.

When improper communications are made to class members, Courts are empowered to mitigate the harm. Federal Rule of Civil Procedure 23(d) gives this Court broad power over the content and substance of any notice provided to Class Members, and the authority to protect absent Class Members from improper and misleading communications. *Id.*; *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 (1981) (“Because of the potential for abuse, a district court has both the duty and the responsibility to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.”). Faced with similar attempts to interfere with class members’ rights, courts have not hesitated to take appropriate remedial action in response to misleading or confusing communications directed at class members. *See Manual for Complex Litig.* § 21.33 (4th ed. 2023); *see also In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1243 (N.D. Cal. 2000) (ordering restriction of communications to class members encouraging opt-out because Rule 23 “contemplates that putative class members will make an informed decision about their decision to opt out of a class” and court “has a duty to ensure that all putative class

members have a genuine choice” to participate); *Masonek v. Wells Fargo Bank*, No. SACV 09-1048 DOC, 2009 WL 1067243, at *3 (C.D. Cal. Dec. 21, 2009) (ordering curative notice and enjoining misleading communications with class members by third party).

And courts routinely require the party at fault to assume the cost of any prophylactic measures. *See, e.g.*, Manual for Complex Litig. § 21.33 (collecting authorities); *see also, e.g., Ralph Oldsmobile, Inc. v. Gen. Motors Corp.*, 2001 WL 1035132, at *7 (S.D.N.Y. Sept. 7, 2001) (ordering corrective notice be sent at the expense of the party at fault); *Hammond v. City of Junction City*, 167 F. Supp. 2d 1271, 1293–94 (D. Kan. 2001) (ordering party at fault to pay attorneys’ fees and costs); *In re McKesson*, 126 F. Supp. at 1247 (ordering printing and mailing costs of curative notice to be paid by party at fault.).

In the recent settlement of a major antitrust case in *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 1:05-MD-1720-(MKB)(JO), the court took similar steps when class counsel identified third-party claims filing services making misleading statements. No. 1:05-MD-1720-(MKB)(JO), ECF No. 7260. The court in that case required that all third-party filing services include disclaimer language in any solicitation materials to protect Class Members.

Any misleading messaging about the Settlement from third parties undermines the aim of protecting Class Members’ rights to complete and accurate information and poses a real risk of adversely affecting Class Members’ ability to make an informed decision about participation in the Settlement. Accordingly, the Court should order that all third-party claims filing services be required to provide a disclaimer with the information described above to ensure that Class Members have complete and accurate information about the Settlement.

IV. CONCLUSION

It is critically important that each and every Class Member receive truthful, accurate and objective information about the terms of the Settlement and be afforded a meaningful choice about whether or not to participate. Accordingly, Plaintiffs request that the Court issue an Order as described herein. Should the Court approve this language, Class Counsel will immediately notify all known third-party claims filing entities of the required disclaimer language.

DATED: November 19, 2024

Respectfully submitted,

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By /s/ Jeffrey L. Kessler

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatories above.

By: /s/ Steve W. Berman

Steve W. Berman